

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

METALS USA, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
SHEET METAL INT'L ASSOC.,	:	
LOCAL UNION NO. 19. ET. AL.	:	No. 01-4365

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 15, 2001

This case arises from the termination of three employees of Plaintiff Metals USA, Inc. ("Metals") the day it entered into a collective bargaining agreement ("CBA") with defendant Sheet Metal Int'l Assoc., Local Union No. 19 ("Local 19"). Presently before the court is plaintiff's motion to stay arbitration of these terminations under the CBA.

The court issued a temporary restraining order enjoining arbitration on August 29, 2001. On September 24, 2001, the court held a hearing addressing plaintiff's motion and took the matter under advisement.¹

A. Findings of Fact:

1. In February, 2001, Local 19 renewed an effort to organize thirty-three workers at Metals. Tr. Sept. 24, 2001, at 14.

¹The plaintiff voluntarily agreed to dismiss its claim against the American Arbitration Association, and proceed solely against Local 19.

2. In March, 2001, Local 19 won a National Labor Relations Board certification election by vote of 22-11. Tr. Sept. 24, 2001, at 14.

3. Local 19 and Metals began negotiating a CBA in the beginning of May, 2001. Tr. Sept. 24, 2001, at 14.

4. Steven Silverman ("Silverman"), Metals' outside counsel, was the employer's principal spokesman for the negotiations. Tr. Sept. 24, 2001, at 16; Tr. Sept. 24, 2001, at 30.

5. Bruce Endy ("Endy"), Local 19's outside counsel, was the union's principal spokesman for the negotiations. Tr. Sept. 24, 2001, at 47.

6. No Metals employees were present during the negotiations. Tr. Sept. 24, 2001, at 16.

7. During the second week of June, 2001, the members of the bargaining unit went on strike for higher wages. Tr. Sept. 24, 2001, at 16.

8. During this strike, representatives of Metals witnessed several violent confrontations between union strikers and individuals attempting to enter Metals' factory. Tr. Sept. 24, 2001, at 18.

9. Metals identified at least three participants in this violence: Michael Palma ("Palma"), Steven Kitt ("Kitt"), and Rasheed Ladson ("Ladson").

10. By July 11, 2001, two major issues were still under negotiation: wages and a drug and alcohol policy. Tr. Sept. 24, 2001, at 20 & 31.

11. On July 11, 2001, at 8:00 a.m., Mark Zgalich ("Zgalich"), together with two other general managers at Metals, decided to terminate Palma, Kitt, and Ladson. Tr. Sept. 24, 2001, at 18.

12. The afternoon of July 11, 2001, Zgalich dictated letters informing the three employees that they had been terminated. Metals sent the letters out on July 12, 2001. Tr. Sept. 24, 2001, at 20; J. Ex. 1A, 1B, and 1C.

13. By 10:30 a.m. on July 11, 2001, negotiations had resumed between Metals and Local 19. Tr. Sept. 24, 2001.

14. During most of the day's negotiations, the delegations from Metals and Local 19 were in separate rooms: a federal mediator, Jon Numair, carried the parties' proposals back and forth. Tr. Sept. 24, 2001, at 32-33.

15. Zgalich notified Silverman that Metals had decided to terminate three employees. Silverman did not immediately inform Endy or any union representative. Tr. Sept. 24, 2001, at 32.

16. The parties reached agreement on the drug and alcohol policy in the morning negotiating session. Tr. Sept. 24, 2001, at 32.

17. In the afternoon session, the mediator carried a wage

proposal from Local 19 to Metals that made it clear an agreement was very close. Tr. Sept. 24, 2001, at 33-34.

18. Metals gave the mediator a "final wage offer" to take back to Local 19: it provided for wage increases of four, three, and two percent in successive years. Tr. Sept. 24, 2001, at 34.

19. The mediator asked whether there were any other issues to discuss. Id.

20. Silverman told the mediator striking workers could return within two days, but three employees would not be permitted to return. Id.

21. Silverman informed the mediator Metals would not arbitrate those discharges under the CBA. Tr. Sept. 24, 2001, at 24; Tr. Sept. 24, 2001, at 35.

22. The parties had already agreed to include a progressive grievance and arbitration clause in the CBA. J. Ex. 5, at 20-23; Tr. Sept. 24, 2001, at 35.

23. The mediator took Metals' wage counter-proposal to Local 19's negotiators. Tr. Sept. 24, 2001, at 37; Tr. Sept. 24, 2001, at 53.

24. The mediator told Local 19's representatives that Metals did not intend to allow all of the striking employees to return to work, but did not name those who would not be permitted to return. Tr. Sept. 24, 2001, at 53.

25. There is no evidence the mediator told Endy or any

other Local 19 representative that Metals refused to arbitrate these terminations.

26. Local 19, after conferring with the mediator, decided to join Metals' representatives in a conference. Tr. Sept. 24, 2001, at 54.

27. At this joint conference, the parties agreed to a three year contract, with raises of four, three, and two percent in successive years. Tr. Sept. 24, 2001, at 54.

28. Endy asked if there were any other outstanding issues. Tr. Sept. 24, 2001, at 39 & 54.

29. The mediator asked both Endy and Silverman to come outside with him to discuss Metals' previous statement to him that it would not permit some of the striking employees to return to work. Tr. Sept. 24, 2001, at 54.

30. Silverman informed Endy that three employees would not be allowed to return to work. Tr. Sept. 24, 2001, at 40; Tr. Sept. 24, 2001, at 54.

31. Silverman did not remember the names of the employees: Endy was informed only that the three employees had committed picket-line misconduct. Tr. Sept. 24, 2001, at 40.

32. Endy did not ask Silverman for the employees' names. Tr. Sept. 24, 2001, at 41; Tr. Sept. 24, 2001, at 64-65.

33. Silverman told Endy that Local 19 was free to file a

charge with the National Labor Relations Board with respect to the terminations. Tr. Sept. 24, 2001, at 41. Endy did not respond to this suggestion. Tr. Sept. 24, 2001, at 56.

34. Both lawyers returned to the joint conference room, and Local 19's representatives agreed to recommend the proposed CBA to the union membership. Tr. Sept. 24, 2001, at 25. Later that day, the membership ratified the CBA. Tr. Sept. 24, 2001, at 57.

35. Article XXII of the CBA provides:

Cause of Discharge

Section 1. No employees on the seniority list shall be disciplined or discharged except for just cause. If in accordance with the arbitration clause hereof, it shall be found that any employee was discharged without just cause, he or she may be reinstated with or without back pay for all or part of the time lost at his or her regular rate of pay; Notwithstanding anything in the Agreement to the contrary, no employee shall be allowed to grieve or otherwise dispute his or her discharge unless such employee files a grievance charge against the Employer within three (3) days from the date of the discharge. J. Ex. 5, at 19.

36. Article XXIII of the CBA provides:

Grievance Procedure:

Section 1. The purpose of this procedure is to secure, at the lowest possible level, and as informally as may be appropriate, an equitable solution to the problems which may arise affecting the terms and conditions of employment under this Agreement. Accordingly, every effort will be made to hold a discussion with the employee and his or her supervisor to resolve the matter prior to submitting a written grievance as defined in Section 3, Step One.

Section 2. The term "grievance" shall mean all disputes by a bargaining unit employee or employer that there has been a breach, misinterpretation, or improper application of this

Agreement. It is not intended that the grievance procedure is to be used to effect changes in the Articles of this Agreement. Verbal warnings and written reprimands will not be subject to arbitration.

Section 3. In order for an alleged grievance to receive consideration under this procedure, the grievant must identify and process the alleged grievance as outlined in Step 1, below, within five (5) working days of the date on which the event(s) giving rise to the grievance occurred.

Step 1: The employee or his union representative must file a written grievance (the "grievance") with the employee's foreman within the five (5) working day time limit specified in the first paragraph of Section 3. The foreman shall investigate the matter and respond to the employee in writing within ten (10) days.

Step 2: If the grievance has not settled at Step 1, it must be presented by the employee and a Union [S]teward to the Plant Manager within five (5) working days after receipt of the Step 1 response of the supervisor. The Plant Manager shall render a written decision within ten (10) [sic] days after receipt of the grievance.

Step 3: If the aggrieved employee is not satisfied with the written decision at Step 2, the employee must, within five (5) working days of receipt of the Step 2 response, present the grievance to the Operations Manager. The Operations Manager shall investigate the matter, and, at the Employer's request, schedule a meeting with the Union Steward and the employee with ten (10) working days following receipt of the grievance. Within ten (10) days following the meeting, the Operations Manager shall respond in writing to the employee and Union [S]teward.

Step 4: If the grievance remains unresolved after exhausting the aforementioned steps, the Union shall have the right to submit the grievance to arbitration. Written notice of the Union's intent to proceed to arbitration shall be filed with the Employer's General Manager with ten (10) working days following the answer given at Step 3. If such notice is not timely given, the grievance shall be barred from arbitration and shall be resolved on the basis of the Step 3 answer. Where a grievance is submitted for arbitration, the arbitrator will be selected according to the then current labor rules of the American Arbitration Association (AAA).

[Section 4, 5, 6, 7, 8, 9, 10, & 11 omitted]

Section 12. The grievance and arbitration procedure above set forth shall be the sole and exclusive means for the determination of all grievances based upon and [sic] alleged breach of this Agreement. With respect to the enforcement of the provisions of this Collective Bargaining [A]greement, neither the employer nor Union nor an individual employee shall institute any action or proceeding in any court of law, or equity, state or federal, or before an administrative tribunal, other than to compel arbitration as provide [sic] in this Agreement, or to seek enforcement of an award of an arbitrator. This provision shall be a complete defense to, and also grounds for, a stay of any action or proceeding instituted contrary to this Agreement. J. Ex. 5, at 20-23.

37. Article XXX of the CBA provides:

Term

This agreement shall have a term of three (3) years commencing July 11, 2001. J. Ex. 5, at 25.

38. Metals did not object to Palma, Kitt, and Ladson

voting to ratify the CBA on the night of July 11th. Tr. Sept. 24, 2001, 85.

39. Local 19 attempted to resolve the disputed terminations of the three employees through the grievance and arbitration process. J. Ex. 3, at 2; J. Ex. 4. The company refused to participate. J. Ex. 3.

B. Discussion:²

Two experienced labor lawyers demonstrated their negotiating skill: by deliberately refraining to tell and refusing to ask each other the names of the three employees who would not be allowed to return to work, the lawyers enabled their clients to conclude a CBA on July 11, 2001, and resolve a bitter strike. Both Endy and Silverman thought that if Local 19 learned the names of the employees, it would have been forced to bargain about their dismissals: plausible deniability enabled the union to ratify the agreement on July 11.

The issue is whether the disputed terminations should be governed by CBA Article XXIII, providing for compulsory arbitration.

1. Jurisdiction:

The case arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185: the court has subject matter jurisdiction under 28 U.S.C. § 1331. The parties do not contest personal jurisdiction. Venue lies in this district under 28

²Any facts in the Discussion section not found in the Facts section are incorporated by reference therein.

U.S.C. 1391(b): all of the relevant events occurred in this district.

2. Interpretation of Agreements to Arbitrate:

Whether or not Metals is bound to arbitrate "is a matter to be determined by the Court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962). A party cannot be "required to submit to arbitration any dispute which he has not agreed so to submit." Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). However, "a collective bargaining agreement is not an ordinary contract" John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964): its scope must be interpreted in light of the "impressive policy considerations favoring arbitration" Id. "Genuine interpretative disputes should be resolved in favor of arbitrability." PaineWebber Inc. v. Hartmann, 921 F.2d 507, 513 (3d Cir. 1990).

3. Metals' Motion for a Preliminary Injunction:

This court will grant a preliminary injunction only if: 1) the movant has shown a reasonable probability of success on the merits; 2) the movant will be irreparably injured by denial of relief; 3) granting the preliminary relief will not result in even greater harm to the nonmoving party; and 4) granting the preliminary relief will be in the public interest. See Allegheny Energy, Inc. v. DOE, Inc., 171 F.3d 153, 158 (3d Cir. 1999).

a. Likelihood of Success on the Merits

Metals contends that CBA Article XXIII does not apply to the termination of Palma, Kitt, and Ladson because: (1) Metals decided to terminate the three before Local 19 ratified the CBA; and/or (2) Metals did not agree to arbitrate those terminations.

(1) When did the termination occur?

Metals argues that the termination of the three employees does not invoke Article XXIII's arbitration clause because its decision was made before the CBA was in effect. Local 19 responds that the employees were not notified that they were terminated until they received letters mailed on July 12, 2001: only actual notice enabled them to grieve under the July 11 agreement.

The Court of Appeals has not ruled on a fact pattern like this:³ In Teamsters Local Union No. 764 v. J.H. Merrit and Co., 770 F.2d 40 (3d Cir. 1985), the court did not resolve whether a grievance arises at the time of the conduct occasioning the grievance or at the time notice of the grievable action is given to the employee. 770 F.2d at 42, n. 1. Metals relies on Downs Carpet Co. v. Philadelphia Joint Bd. Amalgamated Clothing and Textile Workers Union, AFL-CIO, 1993 WL 235927, 1993 LEXIS 8730 (E.D.Pa. June 29, 1993) (Dalzell, J.). However, Downs is not on point.

In Downs, Judge Dalzell decided whether an employer was bound to arbitrate a termination for conduct occurring between the terms of two CBAs. The court applied the Supreme Court's decision in Litton Financial Printing Div. v. N.L.R.B., 501 U.S. 190 (1991), setting out rules for when a grievance arising after the expiration of a CBA relates back. Downs, 1993 WL 235927, at

³The court has carefully considered whether the Court of Appeals' recent opinion in Ameristeel Corporation v. Int. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Arbitration Association, No. 00-3366, 2001 WL 1136023 (September 26, 2001), applies to this action. There, the Court of Appeals analyzed the duties of a successor corporation under applicable Supreme Court precedent. The holding in Ameristeel does not apply here, where there is no prior agreement now said to govern the parties' behavior.

* 4, 1993 LEXIS 8730, at *12. In that limited situation, the "critical time for determining whether a grievance 'arises under' a collective bargaining agreement is the time of the 'occurrences' underlying the dispute, not, as the Union argues, the date of the disciplinary notice." 1993 WL 235927, at *4, 1993 LEXIS 8730, at *14 (quoting Litton, 501 U.S. at 205-6).

Neither Litton nor Downs applies here. The Litton Court's limitation of a union's right to arbitrate post-expiration grievances should not affect a union's right to arbitrate under a newly enacted agreement. The majority of the case law supports Local 19's argument that a grievance arises when an employee receives notice. Common sense suggests the grievance procedure cannot be implemented unless the employee has been notified of the adverse employment action.

For example, in Boeing Company v. Int. Ass'n of Machinists and Aerospace Workers, AFL-CIO, 381 F.2d 119 (5th Cir. 1967), the court addressed a union's argument that events occurring in the interim between CBAs should be governed by the new agreement. The key question was what constituted the grievance: if it was a termination after enactment of the CBA, then the CBA clearly required arbitration. 381 F.2d at 121. The court rejected Boeing's argument that the grievance concerned misconduct occurring during a prior strike, or employer attempts to prevent this misconduct. The "hurt" suffered by the employees was "the loss of the right to return to work when the plants reopened after the strike." Id. at 122; see also N.L.R.B. v. Community Motor Bus Co., 439 F.2d 965, 970 (4th Cir. 1971) ("the dispute over reinstatement arose at a time when the new collective bargaining agreement was in force, even though the challenged conduct took place when the parties had no agreement.").

Metals argues that even if the misconduct did not create the grievance, its decision to fire the three employees on the

morning of July 11th did. It is undisputed that this decision was not communicated directly to the terminated employees, nor did Metals notify Local 19 of the terminated employees' names. This does not constitute notice of termination. See United Steelworkers v. Bell Foundry Co., 626 F.2d 139, 141-42 (9th Cir. 1980) (actual notice required to give rise to a grievable dispute).⁴

Metals' argument, if accepted, would create bad incentives for employers. Article XXIII, § 3, of the CBA sets forth a series of deadlines in the grievance process. If a grievance arises when either: (1) the misconduct occurs; or (2) the employer decides to fire the employee, then deciding when this time line begins to run would be solely in the employer's control. As Local 19 argues, the employer could decide to fire an employee on Day 1, wait 6 days before telling her, and so insulate its decision from arbitration entirely. This makes no sense: Metals is not reasonably likely to establish it gave the employees notice of their termination by its general statement to the Union bargaining representatives on July 11, 2001.

Here, the grievance arose when the three employees were notified by the employer that they would not be permitted to return to work. At the very earliest, this notice occurred on July 12, 2001. The agreement, by its terms, commenced July 11, 2001. J. Ex. 5, at 25.

⁴At oral argument, counsel for Metals asserted that by telling Endy three unnamed employees would not be allowed to return to work, Endy became obliged to inquire further. Metals cites no case law for this burden-shifting proposition. Metals is not reasonably likely to establish that telling a union negotiator three unnamed employees would not be allowed to return to work gives those individual employees adequate notice of their terminations.

- (2) Even if these grievances would generally be arbitrable, did the parties agree not to arbitrate the termination of Palma, Kitt, and Ladson?

Metals advances a second argument: it did not agree to arbitrate the terminations of these specific employees. If Metals did not agree to arbitrate this particular dispute, then it would not matter that it had generally agreed to arbitrate all disputes under the CBA. See N.L.R.B., 439 F.2d at 470 (express reservation of right to screen returning employees waived arbitration clause).

Metals has the burden of proof on a motion for a preliminary injunction. Telling Local 19's representatives that three unnamed employees would not be allowed to return to work did not put the union on notice the terminations would not be arbitrated because the union did not know who those employees were.⁵ On this record, Metals has not established that it is reasonably likely to prevail. Endy, as an agent for Local 19, did not have a duty of inquiry when Metals told him three unnamed employees would not be allowed to return to work. To remove the discharges of these three employees from arbitration under the CBA, Metals had to make an "express reservation," not a vague oral qualification.⁶

⁵Metals argues that Local 19 was on constructive notice because it had enjoined at least one of the workers from participating in picketing in late May, and the union had represented the workers in that action. Metals provides no authority to support its argument that constructive notice is adequate notice. But see United Steelworkers, 626 F.2d at 141 (actual notice required).

⁶Silverman also testified that he informed Endy during their private conference he did not consider the terminations arbitrable. Tr. Sept. 24, 2001, at 40-41. Endy does not recall
(continued...)

N.L.R.B. is especially instructive. There, the company and union specifically negotiated whether striking employees could return to work. The company stated that it would not allow any employee to return to work who had participated in illegal activities, and that it would screen each employee accordingly. The union's representative testified that this condition was expressly communicated to the striking workers who voted to accept it. According to the Court of Appeals, it was "clear ... that the company's reservation of a right to screen the strikers for illegal conduct was fully understood by the union members when they voted on the contract and by the union officials when they signed the contract." N.L.R.B., 439 F.2d at 969. No such evidence exists here.

Metals has not established a "compelling case for nonarbitrability," and is not reasonably likely to do so. PaineWebber, 921 F.2d at 513.

b. Irreparable Injury, Harm to Local 19, and the
Public Interest

If Metals were reasonably likely to succeed on the merits, it would be entitled to a preliminary injunction. See PaineWebber, 921 F.2d at 515. However, Metals is unlikely to succeed on the merits.

C. Conclusions of Law:

⁶(...continued)
any mention of arbitration. Tr. Sept. 24, 2001, at 55-56 & 58. It is not necessary to decide whose testimony is accurate: even if Silverman told Endy that three unnamed employees' terminations would not be arbitrable, this was not an express reservation defeating the presumption in favor of the arbitration of qualified disputes.

1. The court has jurisdiction over the subject matter of the action, personal jurisdiction over the defendants, and venue properly lies in this district.

2. Plaintiff voluntarily withdrew its claim against the American Arbitration Association: it will be dismissed from this action with prejudice.

3. Plaintiff is not reasonably likely to establish that the CBA does not apply to the terminations of Palma, Kitt, and Ladson. The CBA took effect the night of July 11, 2001. Metals sent notice to the employees of their termination on July 12. The grievances subject to arbitration are the terminations of the employees, not their original misconduct.

4. Plaintiff is not reasonably likely to establish that it did not agree to arbitrate these specific disputes because on the day the agreement was reached it told representatives of Local 19 it would not allow three unnamed employees to return to work. An express reservation that Metals would not arbitrate the termination of specific named employees was necessary to satisfy the movant's burden.

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ORDER

AND NOW, this 15th day of October, 2001, after consideration of plaintiff's brief in support of its Petition to Enjoin Arbitration and defendant's brief in Opposition to Metals USA's Petition to Enjoin Arbitration, and after a hearing on September 24, 2001, in which all parties had an opportunity to be heard, and for the reasons stated in the foregoing memorandum,

It is **ORDERED** that:

1. Plaintiff's claims against the American Arbitration Association are **DISMISSED WITH PREJUDICE**.

2. Plaintiff's motion to enjoin arbitration is **PRELIMINARILY DENIED**.

3. The parties shall contact the court as to further

proceedings, if any, on or before November 24, 2001.

Norma L. Shapiro, S.J.